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The Presumption of Limited Liability for Foreign Government Corporations: Myth versus Reality

I. INTRODUCTION

In *First National City Bank v. Banco Para El Comercio Exterior de Cuba*¹ ("*Banco*"), the United States Supreme Court first confronted the issue whether foreign government corporations are entitled to a presumption of limited liability as are private domestic corporations.² The Court, in an opinion authored by Justice O'Connor, found that foreign corporations were entitled to the same presumption of limited liability as private corporations.³ In addition, the Court examined and discussed the circumstances under which it would pierce a foreign government corporation's veil of limited liability.⁴

This Note analyzes the Court's reasoning and seeks to show that the *Banco* holding does not comport with the true nature of government corporations. Specifically, this Note will survey the traditional rationales underlying the presumption of limited liability and demonstrate how these rationales are inapplicable to government corporations. Finally, this Note argues that a presumption of unlimited liability should apply to government corporations due to their unique nature.

II. THE CASE

A. *The Facts*

In 1959, Cuba underwent a violent political revolution.⁵ The revolutionary government, headed by Fidel Castro and Ernesto Che

1. 462 U.S. 611 (1983).

2. The Court acknowledged the widespread and growing use of such corporations by many nations and the features peculiar to such institutions. *Id.* at 624. For example, government corporations are created by statute and managed within parameters specified in the enabling statute. *Id.*

3. *Id.* at 613.

4. *Id.* at 632. For the reasons justifying this piercing of the corporate veil, see *infra* text accompanying notes 100-145. By the time *Banco* reached the Supreme Court, the Republic of Cuba had been substituted for Banco Para El Comercio Exterior de Cuba, also known as Bancec. *Banco*, 462 U.S. at 616.

5. See CUBA, A COUNTRY STUDY 42 (J. Rudolph 3d ed. 1987).

Guerva, reformed Cuba's political, military, economic and cultural policies.⁶ By virtue of the ideology underlying the reform movement, Cuban-Soviet relations improved to the detriment of Cuban-United States affairs.⁷ In 1960, the Eisenhower Administration punished Cuba economically for its pro-Soviet stance by suspending all sugar imports from Cuba.⁸ In retaliation, Cuba nationalized various United States and foreign properties in Cuba.⁹

Among the properties nationalized were Citibank's branches in Cuba.¹⁰ Prior to the nationalizations, Citibank had issued a letter of credit¹¹ in the amount of \$193,280.30 at the request of a Canadian-Cuban sugar company for a sugar purchase made by Banco Para El Comercio Exterior de Cuba ("Bancec").¹² In the regular course of business, Banco Nacional de Cuba¹³ presented the letter of credit to Citibank in Bancec's favor, just days before the nationalizations took place.¹⁴ By the time of payment on the letter of credit, the Cuban government had acquired Citibank's branches in Cuba without compensating the bank for this takeover.¹⁵ As a result, Citibank informed Bancec that it would credit the amount to Banco Nacional's account and use the balance of Bancec's account as a setoff against the value of the nationalized branches.¹⁶ In sum, Citibank took control of the remainder of Bancec's funds to account for the loss Citibank suffered by the nationalization.

On February 1, 1961, Bancec filed suit in the United States Dis-

6. *Id.* For example, extensive agrarian reforms were undertaken while Cuba, as a whole, was guided toward militancy, idealism and revolutionary fervor. *Id.* at 46.

7. *Id.* at 43-46.

8. *Banco Para El Comercio Exterior de Cuba v. First Nat'l City Bank*, 505 F. Supp. 412, 420 (S.D.N.Y. 1980).

9. Cuban Law No. 851, enacted July 6, 1960, authorized the President and the Prime Minister to "proceed to nationalize, through forced expropriation, the properties or enterprises owned by physical and corporate persons who are nationals of the United States of North America." *Banco Para El Comercio Exterior de Cuba v. First Nat'l City Bank*, 658 F.2d 913, 916 (2d Cir. 1981), *rev'd*, 462 U.S. 611 (1983).

10. *Banco*, 658 F.2d at 905-06.

11. A letter of credit is essentially a promissory note. However, the promisor is not the importer but rather the importer's bank. T. CLASEN, *FOREIGN TRADE AND INVESTMENT: A LEGAL GUIDE* 92 (1987).

12. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 613 (1983).

13. Banco Nacional de Cuba was Cuba's central bank. *Id.*

14. *Id.* at 614.

15. *Banco Para El Comercio Exterior de Cuba v. First Nat'l City Bank*, 505 F. Supp. 412, 420-23 (S.D.N.Y. 1980).

16. In essence, Citibank was trying to satisfy its claim with the only source of Cuban funds available to it. *Banco*, 462 U.S. at 615.

strict Court to recover the money alleging that Citibank had wrongfully exercised the setoff.¹⁷ However, before Citibank filed an answer, Bancec was dissolved.¹⁸ At first, Bancec's commercial export activities were assigned to Empresa Cubana de Exportaciones, a newly-created government corporation of the Republic of Cuba.¹⁹ Then Empresa dissolved and assigned its sugar exporting functions to another Cuban government corporation.²⁰ In effect, Bancec's function as a trading company became scattered throughout various departments of the Cuban government.

When Citibank filed its answer and counterclaim²¹ on March 8, 1961, Bancec had completed dividing its functions and dissolution proceedings.²² On July 7, 1961, Bancec and Citibank agreed to replace Bancec with the Republic of Cuba, specifically, its Ministry of Foreign Trade, as the plaintiff.²³

B. Procedural History

In 1977, the district court held a bench trial and, after hearing evidence on the legal independence of Bancec,²⁴ granted Citibank's counterclaim. The court based its opinion on two grounds. First, it held that Bancec was an alter ego of the Cuban government.²⁵ The district court principally relied on Bancec's engagement in "conduct of the sort . . . tend[ing] to be supervised and managed by Government."²⁶ Second, the court found that the strong equities of the case supported Citibank's counterclaim.²⁷

17. *Banco*, 505 F. Supp. at 418.

18. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 615-16 (1983).

19. *Id.* at 615.

20. *Id.* at 615-16.

21. Citibank's counterclaim was for the value of its branches nationalized by Cuba on September 17, 1960. *Banco Para El Comercio Exterior de Cuba v. First Nat'l City Bank*, 505 F. Supp. 412, 428 (S.D.N.Y. 1980).

22. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 616 (1983).

23. *Id.* Apparently the reason for the substitution was that the Ministry of Foreign Trade had become the *de facto* operator of Bancec and its progeny.

24. *Banco*, 505 F. Supp. at 429. The district court could have undertaken further analysis of the managerial, financial and structural independence of Bancec vis-a-vis the Ministry of Foreign Trade.

25. *Id.* at 425.

26. *Banco Para El Comercio Exterior de Cuba v. First Nat'l City Bank*, 505 F. Supp. 412, 428 (S.D.N.Y. 1980).

27. *Id.* at 429-30. The court based this conclusion primarily on the finding that Cuba had violated international law by nationalizing property without providing adequate compensation.

The Court of Appeals for the Second Circuit reversed the district court.²⁸ The appellate court explicitly rejected the "government conduct" criterion used by the district court.²⁹ Rather, the Second Circuit held that courts should recognize the independence of government corporations unless the dependent corporation played a "key role"³⁰ in the matter giving rise to the counterclaim.³¹ Because the court of appeals found Bancec not liable for the acts of the Cuban government, the court held that the counterclaim had no legal basis³² and denied Citibank's subsequent motion for a rehearing en banc. However, the Supreme Court granted Citibank's writ of certiorari³³ and allowed the counterclaim.³⁴

III. PREVIOUS DEVELOPMENTS REGARDING CUBAN CORPORATIONS

To fully understand the impact of the Supreme Court's opinion, some preliminary observations about the *Banco* case are necessary. Initially, the Court of Appeals for the Second Circuit set forth its "key role" doctrine in *Banco Nacional de Cuba v. First National City Bank of New York* ("*Banco I*").³⁵ The court in *Banco I* allowed a similar offset by Citibank against the value of Citibank branches nationalized by Cuba.³⁶ The rationale for the decision was that Banco Nacional, as Cuba's central bank, had actively cooperated or played a key role in the nationalization effort.³⁷

28. *Banco Para El Comercio Exterior de Cuba v. First Nat'l City Bank*, 658 F.2d 913 (2d Cir. 1981), *rev'd*, 462 U.S. 611 (1983).

29. *Id.* at 917.

30. The court did not provide a legal definition for "key role." However, it recited facts that may indicate what constitutes a "key role." The court emphasized that it was Banco Central, and specifically its president Che Guevara, who ordered occupation of Citibank's branches. Likewise, it was Banco Central officials who took over day-to-day operation of the nationalized branches. *Id.* at 918.

31. *Id.*

32. *Id.* at 920.

33. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 459 U.S. 942 (1982).

34. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 633 (1983).

35. 478 F.2d 191, 193-94 (2d Cir. 1973). For a possible definition of "key role," see *supra* note 30.

36. In *Banco I*, Citibank sold certain collateral on a loan to Banco Nacional de Cuba. It also attempted to partially offset the money against the value of its nationalized branches. *Id.* at 192.

37. *Id.* at 193. The court of appeals based its decision on the belief that where a "key role" is played by an entity in the nationalization, the entity is more culpable for the acts

The Second Circuit reapplied the "key role" doctrine in *Banco Nacional de Cuba v. Chemical Bank N.Y. Trust Co.* ("*Banco II*").³⁸ In *Banco II*, Banco Nacional sued certain New York banks, including Chemical Bank, for the return of funds belonging to Banco Nacional itself and other Cuban nationalized banks.³⁹ Chemical Bank counterclaimed to offset those funds against loans it had extended to the Cuba Electric Company, a company whose assets had also been nationalized by the Cuban government.⁴⁰ The court found that the key role doctrine did not validate the counterclaim⁴¹ because Banco Nacional had not participated in the electric company's nationalization.⁴² Instead, the court developed a new basis for allowing the counterclaim.⁴³ It deemed Banco Nacional to be an agent of Cuba which sought funds for Cuba's benefit. Based on this new "agency" ground, the court upheld the counterclaim.⁴⁴ Banco Nacional then appealed to the United States Supreme Court.

IV. THE SUPREME COURT'S REASONING

A. *Inapplicability of the Foreign Sovereign Immunities Act*

The first issue that the Supreme Court considered was whether the Foreign Sovereign Immunities Act of 1976 ("FSIA")⁴⁵ substantively or procedurally affected the case.⁴⁶ The legislative history of the FSIA convinced the Court that the FSIA had no effect on the application of substantive law.⁴⁷ The House Report on the FSIA indicated that "[t]he bill is not intended to affect the substantive law of

committed. Therefore, there is justification for imposing certain burdens, such as a counterclaim, on the entity.

38. 658 F.2d 903 (2d Cir. 1981).

39. *Id.* at 905.

40. Cuban Electric was a Florida corporation controlled by United States investors. *Id.* at 906-07. However, most of its assets were in Cuba where it operated an electric utility. *Id.* at 907.

41. *Id.* at 905.

42. *Id.* at 910.

43. *Banco Nacional de Cuba v. Chemical Bank N.Y. Trust Co.*, 658 F.2d 903, 911 (2d Cir. 1981).

44. *Id.*

45. 28 U.S.C. §§ 1602-1611 (1983).

46. A major purpose of the FSIA is to codify existing "restrictive" principles of sovereign immunity. Under this view, a foreign government is shielded from suit based on its public acts. However, a government remains exposed to suit based on its commercial activities and other private conduct. See generally H.R. REP. NO. 1487, 94th Cong., 2d Sess. (1976).

47. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983).

liability . . . [n]or is it intended to affect . . . the attribution of responsibility between or among entities of a foreign state . . . or whether an entity sued is liable in whole or in part for the claimed wrong."⁴⁸ The Court further stated that "[o]ur resolution of that question [Bancec's liability] is guided by the policies articulated by Congress in enacting the FSIA."⁴⁹

Similarly, the Court found that the FSIA was irrelevant to the procedural posture of the case.⁵⁰ Specifically, the Court observed that section 1607(c) of the FSIA clearly allows counterclaims by private defendants, even where the plaintiff is a "foreign state," which encompasses state instrumentalities and agencies.⁵¹ In relevant part, section 1607 provides: "In any action brought by a foreign state . . . the foreign state shall not be accorded immunity with respect to any counterclaim . . . to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the state."⁵² In *Banco*, Citibank's claim was identical to Bancec's in that both demanded money; Bancec for its letter of credit, and Citibank for its confiscated branches.⁵³ The Court, therefore, held that the counterclaim against Bancec remained procedurally and substantively unaffected by the FSIA.⁵⁴

B. Choice of Law

Once the Court concluded that Bancec was amenable to a counterclaim, it considered the issue of which law to apply in the case: Cuban law, United States law, or New York corporate law.⁵⁵ Bancec argued that Cuban law should determine the validity of both its original claim and Citibank's counterclaim.⁵⁶ This argument was based on an international choice of law doctrine which requires the application

48. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 12 (1976).

49. *Banco*, 462 U.S. at 621.

50. *Id.* at 620.

51. *Id.*

52. 28 U.S.C. § 1607(c) (1983). This provision basically codifies the Court's holding in *National City Bank v. Republic of China*, 348 U.S. 356 (1955). There, the Court considered it unfair for a government to sue in United States courts, yet shield itself from a counterclaim based on the very laws that afford it a remedy. *Id.* at 361-63. Practically, the requirement that the remedies sought by the two sides be similar is that both sides demand either legal or equitable relief.

53. See *supra* notes 20-23 and accompanying text.

54. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620-21 (1983).

55. *Id.* at 621-23.

56. *Id.* at 621.

of the laws of a corporation's country of incorporation.⁵⁷ However, the Supreme Court summarily dismissed this argument.⁵⁸

The Court expressed concern that using the law of the country of incorporation "would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability."⁵⁹ It distinguished a hypothetical situation involving the internal affairs⁶⁰ of a corporation,⁶¹ reasoning that the law of the state of incorporation in that instance would be appropriate for the protection of the "justified expectations of parties with interests in the corporation."⁶² However, this interest is absent when the involved parties are disinterested in the corporation's internal affairs.⁶³ Therefore, where the rights of third parties are involved, different choice of law principles are deemed appropriate.⁶⁴

The Court next addressed Bancec's contention that the alternative body of applicable law should be the New York state law.⁶⁵ Bancec urged the Court to use both the commercial law and the choice of law principles of New York.⁶⁶ However, the court also re-

57. E. RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 31 (1947); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 297 (1971). See also Nadelmann & Von Mehren, *A French Draft of a Law on Private International Law*, 18 AM. J. COMP. L. 614, 619 (1970); Coester-Waltjen, *German Conflict Rules and the Multi-National Enterprise*, 6 GA. J. INT'L. & COMP. L. 197, 202-06 (1976). In civil law countries, the law of the country of incorporation is the applicable law in cases involving the corporation. E. RABEL, *supra*, at 33.

58. *Banco*, 462 U.S. at 621-22.

59. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 (1983).

60. *Id.* at 621. See also *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 302 (1971).

61. *Banco*, 462 U.S. at 621.

62. *Id.* Such choice of law principles, for example, would govern the solicitation of proxies, election of directors and issuance of stock. Shareholders in a corporation know the state of incorporation of their company. They also know that internal disputes regarding the management and operation of their corporation are governed by the law of that state. See, e.g., DEL. CODE ANN. tit. 8, § 394 (1989).

63. Cost prohibits outsiders to a corporation from ascertaining the corporation's state of incorporation in every transaction. For example, a trade creditor cannot continually inquire into the state of incorporation of his or her customers. Therefore, it would be unreasonable to hold third parties to the laws of a state whose identity is practically unknown to them.

64. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983).

65. *Banco*, 462 U.S. at 622 n.11. This argument was founded on the premise that the forum of the dispute should provide the appropriate rules of decision.

66. Bancec's argument rested on the similarity between § 2674 of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1988), and § 1606 of the FSIA, 28 U.S.C. §§ 1602-1611 (1988). Both sections provide that when the sovereign is amenable to suit, it "shall be liable in the same manner and to the same extent as a private individual under like circumstances."

jected this assertion,⁶⁷ because if it adopted the forum state's choice of law rules, the Court would expose the United States' foreign relations to "divergent and perhaps parochial state interpretations."⁶⁸ To avoid this potential problem, the Court adopted federal common law as the appropriate law where attribution of liability among entities of a foreign state is involved.⁶⁹ Using federal rules of decision would result in less inconsistency in cases involving foreign corporations.

C. *Presumption of Limited Liability*

Before applying federal common law, the Court examined the general nature of government corporations.⁷⁰ It concluded that many of these corporations closely resemble private corporations.⁷¹ Both government and private corporations have specific powers and duties,⁷² a board of directors, management⁷³ and a separate economic identity.⁷⁴ Furthermore, the Court accepted the proposition that legal personality is "an almost indispensable aspect of the public corporation."⁷⁵ Finally, the Court observed that government corporations are vested with "a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies."⁷⁶

Banco, 462 U.S. at 622 n.11. The Court distinguished § 1606 of the FSIA as being silent regarding the attribution of liability among entities of foreign countries. *Id.*

67. *Banco*, 462 U.S. at 622.

68. *Id.* (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964)). For example, if a state's choice of law rules required it to apply a foreign country's substantive law, foreign governments could design laws so that its corporations could evade legal liability for actions in the forum state. A foreign government could accomplish this by requiring its corporations to submit themselves only to the foreign government's jurisdiction.

69. *Id.*

70. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 624-27 (1983).

71. *Id.* at 623-28.

72. *Id.* at 624.

73. *Id.*

74. *Id.*

75. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983) (quoting Friedman, *Government Enterprise: A Comparative Analysis*, in *GOVERNMENT ENTERPRISE: A COMPARATIVE STUDY* 303, 333-34 (W. Friedman & J. Garner ed. 1970)). A legal personality allows the corporation to sue and be sued. This in turn encourages creditors and suppliers to interact with the entity with a greater degree of assurance that they will be reimbursed upon default. Without legal personhood, creditors' hesitancy in extending credit would cripple the government corporation's daily operations. *Cf. Amicus Curiae, infra* note 120, at 8-9.

76. *Banco*, 462 U.S. at 624-25.

These characteristics, of course, directly result from the purpose for which such corporations are founded. Government corporations, [have] become an essential instrument of economic development in the economically backward countries which have insufficient private venture capital to develop the utilities and industries which are given priority in the national development plan. Not infrequently, these public development corporations . . . directly or through subsidiaries, enter into partnerships with national or foreign private enterprises⁷⁷

In short, government corporations have become part of the socioeconomic fabric of many less-developed, or newly-industrialized countries.⁷⁸

Due to the similarities between private sector and governmental corporations, both in form and overall purpose, the Supreme Court extended the presumption of limited liability to government corporations.⁷⁹ This position, the Court pointed out, was in accord with British court opinions.⁸⁰ Most importantly, by granting government corporations the presumptive shield of limited liability, the Court did not undermine foreign governmental policies of establishing such enterprises.⁸¹ A contrary holding would have "cause[d] third parties to hesitate before extending credit to a government instrumentality without the government's guarantee."⁸² This presumption of limited liability for government corporations thus gives effect to principles of

77. *Id.* at 625 (quoting Friedman, *Government Enterprise: A Comparative Analysis*, in GOVERNMENT ENTERPRISE: A COMPARATIVE STUDY 303, 333-34 (W. Friedman & J. Garner ed. 1970)).

78. Less developed countries, such as Bangladesh, Laos and Tanzania, are commonly called LDCs. Likewise, newly industrialized countries, such as Hong Kong, South Korea and Taiwan, are called NICs.

79. *Banco*, 462 U.S. at 626-27. Of course the government corporation must have been duly organized, chartered, and registered so as to qualify for limited liability. These requirements must be met by all corporations, whether their stock is held by the government or private investors. *See, e.g.,* *Timberline Equip. Co. v. Davenport*, 267 Or. 64, 514 P.2d 1109 (1973) (requiring strict compliance with state incorporation statutes).

80. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626 n.18 (1983). The Supreme Court noted that British courts "have shown marked reluctance to attribute the acts of a foreign government to an instrumentality owned by that government." *Id.* For example, in *C. Czarnikow Ltd. v. Rolimpex*, App. Cas. 351 (1979), the House of Lords excused a Polish government agency from executing a sugar export contract because of the Polish government's order banning such sales. The order was considered *force majeure* and not imputable to the agency. *See Banco*, 462 U.S. at 626 n.18.

81. *Banco*, 462 U.S. at 625.

82. *Id.* at 626 (citing Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 516-17 (1976)).

comity and international economic cooperation.⁸³

D. Piercing the Corporate Veil

As with private corporations, the Court held that the presumptive independence of governmental corporations may be overcome on equitable grounds⁸⁴ including unjust enrichment, fraud and considerations of public policy.⁸⁵ It is generally accepted that a corporation's shareholders may not abuse their privilege of limited immunity to violate laws or rights of third parties.⁸⁶ Likewise, these corporations may not engage in self-dealings or acts unauthorized by the corporation's charter.⁸⁷ This principle is recognized worldwide⁸⁸ and is embodied in international common law.⁸⁹

Next, the Court found Bancec to be the alter ego of the Cuban government.⁹⁰ The Court stated that to give "effect to Bancec's separate juridical status . . . would permit the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain in our courts [what] it could not obtain in its own right"⁹¹ In order to prevent any potential unjust enrichment by Cuba, the Court looked beyond the mere legal facade of Bancec and allowed Citibank to make its counterclaim.⁹² By granting this counterclaim, the Court forced Cuba to take responsibility for nationalizing foreign properties.

The Court condemned Cuba's nationalizations as contrary to es-

83. The Court also adopted other doctrines within federal common law that allow such a presumption to be rebutted. Instances in which the presumption of limited liability is rebutted are commonly referred to as piercing the corporate veil. See, e.g., *Pepper v. Litton*, 308 U.S. 295 (1939).

84. *Banco*, 462 U.S. at 629.

85. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983).

86. *Id.* at 629-30.

87. *Id.* at 630 (citing *Bangor Punta Operations, Inc. v. Bangor & Aroostook R. Co.*, 417 U.S. 703 (1974)).

88. See generally *Case Concerning the Barcelona Traction, Light & Power Co.*, 1970 I.C.J. 3. See also RESTATEMENT OF FOREIGN RELATIONS LAW § 111(1) (Revised) (Tent. Draft No. 1, 1980).

89. When nations repeatedly address an issue by their international practice, that issue becomes a subject of international law. *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980). See also Brief for the United States as Amicus Curiae in *Filartiga*, reprinted in 19 INT'L LEGAL MAT. 585, 588-89 (1980).

90. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 633 (1983).

91. *Id.* at 632.

92. *Id.* at 633.

tablished international law.⁹³ Cuba's seizure of United States business assets was extensively litigated in United States courts, and the impropriety of this Cuban action had been established in prior cases.⁹⁴ There was ample evidence that Cuba's actions were specifically aimed at United States targets and carried out in bad faith.⁹⁵ The equities of *Banco* were strong enough, in the Court's opinion, to require Bancor to defend the counterclaim.⁹⁶ In essence, Cuba wanted to use United States law to receive payment on the letter of credit "but it wanted our law [United States law] free from the claims of justice."⁹⁷

V. UNCLEAR CONCLUSIONS AND MISPLACED ASSUMPTIONS

Nevertheless, the Court failed to set forth a "mechanical formula" to determine the amenability of foreign government corporations to suit.⁹⁸ Although the Court was correct in its holdings for waiver of the FSIA, choice of law and the piercing of the corporate veil, the Court was incorrect in assuming that government corporations are independent entities. Many of the reasons for the assumed independence of private corporations simply do not exist for governmental corporations.⁹⁹ The Court should have examined the real nature of government corporations and set forth principles of law which reflect those realities suggesting that government corporations are not independent and should not enjoy the presumption of limited liability.

A. Private Sector Factors Inapplicable to Government Corporations

The traditional policies favoring corporate limited liability are grounded on the principle of promoting economic growth.¹⁰⁰ From

93. *Id.* For the view that the Court misunderstood the holding of cases allegedly characterizing Cuba's actions as a violation of international law, see Note, *Making Cuba Pay: Satisfaction of Nationalization Claims Against Cuba*, 10 BROOKLYN J. INT'L L. 515, 536-39 (1984).

94. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1967). The Court in *Banco* specifically relied on *Banco I*.

95. See, e.g., Resolution 1, Aug. 6, 1960. Pursuant to Law No. 851 of Aug. 6, 1960 (specifically mentioning United States targets for nationalization). *Banco Nacional de Cuba v. Chemical Bank N.Y. Trust Co.*, 658 F.2d 903, 907 (2d Cir. 1981).

96. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 633 (1983).

97. *Id.* at 632 (quoting *National City Bank v. Republic of China*, 348 U.S. 356, 361-62 (1955)).

98. *Id.*

99. Ghai, *Law and Public Enterprise in Developing Countries*, in *PUBLIC ENTERPRISE AND THE DEVELOPING WORLD* 59 (V. Ramanadham ed. 1984).

100. See, e.g., Manne, *infra* note 113, at 260.

this foundation, courts and commentators commonly advance eight distinct rationales for granting limited liability to the shareholders of a private corporation. The following is a discussion of the eight rationales and why those rationales do not apply to government corporations.

First, one of the initial arguments supporting limited liability for private corporations is that such a presumption reduces the need for constantly monitoring corporate managers.¹⁰¹ If shareholders were held liable for all consequences of management action, they would have to expend considerable resources monitoring the managers.¹⁰² These resources could conceivably exceed the shareholders' investments in the corporation. Therefore, in order to make investments feasible, the law grants shareholders the privilege of limited liability.¹⁰³ Under such a regime, shareholders are immune from claims of voluntary and involuntary creditors exceeding their investment in the corporation.¹⁰⁴

In contrast, this rationale does not apply in the case of government corporations. In government corporations, the degree of involvement by the sole shareholder—the government—is so great that any additional need for monitoring by the government is unnecessary.¹⁰⁵ For example, government corporations commonly have one or more ministers on their boards¹⁰⁶ who closely monitor the conduct of the managers.¹⁰⁷ The minister often takes an active role in managing the corporation.¹⁰⁸ Thus, when ministerial involvement is extensive, the monitoring rationale does not apply. As the degree of involvement increases, the need for monitoring decreases. In turn, as the need for monitoring decreases, the need for a presumption of limited liability decreases. In government corporations, where the shareholder is also the manager,¹⁰⁹ monitoring costs are slight. Thus, there

101. Easterbrook & Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 94-95 (1985).

102. *Id.*

103. *Id.*

104. See, e.g., DEL. CODE ANN. tit. 8, § 102(b)(6) (1986).

105. Brief for Respondent app. at a3, *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1986) [hereinafter Appendix].

106. *Id.*

107. *Id.*

108. *Id.* For the degree of U.S. government involvement in the affairs of U.S. government corporations, see The Government Corporations Act of 1945, 31 U.S.C. §§ 9101-9109 (1989).

109. Appendix, *supra* note 105, at a3.

is no need to presume that the shareholders need a legal shield to protect them from potentially costly acts of managers.

The second rationale for a presumption of liability for corporations has been the need to eliminate monitoring of other shareholders.¹¹⁰ In a corporation without limited liability, shareholders are jointly liable to the full extent of their respective wealth for corporate obligations.¹¹¹ As such, there is a great incentive to have solvent fellow shareholders. Consequently, an individual shareholder will constantly monitor the wealth of other shareholders to ensure that they do not transfer their wealth to others, leaving the individual shareholder exposed to large claims.¹¹² This rationale does not apply to government corporations because they are by definition owned by a single shareholder—the government. Thus, there are no other shareholders to be monitored.

A third rationale advanced for the grant of corporate limited liability is to promote the marketability and free transfer of shares.¹¹³ If a potential shareholder were required to monitor other shareholders to ensure their solvency, he would be unwilling to purchase a share on an organized market without knowledge as to the identity and solvency of each shareholder.¹¹⁴ This rationale is also inapplicable to a government corporation. When the activities of the government corporation are such that private enterprise is unwilling to invest in the corporation or when the government has made a purposeful decision to limit shareholdings in the enterprise, a grant of limited liability is unnecessary. Because government shares are not intended to be publicly traded, this rationale does not justify a grant of limited liability.

Fourth, giving managers incentives to act efficiently has been cited as a rationale for extending limited liability to corporations.¹¹⁵ This rationale is essentially an extension of the “marketability” rationale. When managers in a corporation act inefficiently, shareholders use the free transferability of their own shares, afforded by limited

110. Easterbrook & Fischel, *supra* note 101, at 95.

111. W. CARY & A. EISENBERG, *CASES AND MATERIALS ON CORPORATIONS* 91-92 (1988).

112. Easterbrook & Fischel, *supra* note 101, at 95.

113. Manne, *Our Two Corporation System: Law and Economics*, 53 VA. L. REV. 259, 264-65 (1967). Professor Manne advocates the theory that without limited liability, organized securities markets would not be possible. *Id.* at 262.

114. *Id.*

115. Easterbrook & Fischel, *supra* note 101, at 95.

liability, to divest themselves of those shares.¹¹⁶ As more and more investors divest, the price of the shares will decline.¹¹⁷ This decline in price creates an opportunity for an investor to "takeover" the corporation, run it efficiently, and realize a profit.¹¹⁸ However, because government shares are not publicly traded, this extended marketability theory is also inapplicable to government corporations. Even if government shares were publicly traded, the types of businesses run by these corporations typically discourage outside attempts at reorganization, interference or investment.¹¹⁹ This is because government corporations take risks that would be prohibitive for the private sector.¹²⁰

Two examples of such corporations in the United States include the National Railroad Passenger Corporation and the Export-Import Bank of the United States. The National Railroad Passenger Corporation, commonly referred to as Amtrak, is the primary provider of national rail transportation in the United States and has been consistently unprofitable.¹²¹ Despite recent efforts to increase productivity and efficiency, Amtrak's revenues only cover seventy-two percent of the cost of operating the service.¹²² This revenue-to-cost ratio is actually a historic high.¹²³ More typically, in 1981, revenues provided less than fifty percent of Amtrak's operating costs.¹²⁴

The Export-Import Bank of the United States ("Ex-Im Bank"), whose capital is provided by the U.S. government, provides medium and long-term credit to U.S. exporters.¹²⁵ Ex-Im Bank has suffered a series of losses in recent years,¹²⁶ which indicates its unprofitability

116. Easterbrook & Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 701 (1982); Manne, *Mergers and the Market for Corporate Control*, 78 J. POL. ECON. 110 (1965).

117. *Id.*

118. *Id.*

119. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983) (quoting Friedman, *Government Enterprise: A Comparative Analysis*, in GOVERNMENT ENTERPRISE: A COMPARATIVE STUDY 303 at 303-04 (W. Friedman & J. Garner ed. 1970)).

120. *Id.* See also Amicus Curiae brief of The International Center for Law in Development at 6, *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (No. 81-984) [hereinafter Amicus Curiae].

121. L.A. Times, Jan. 9, 1990, at 3, col. 2.

122. *Id.*

123. *Id.*

124. *Id.* For more information on Amtrak's operations and financial status, and predictions of its ultimate demise, see G. HAMILTON, AMTRAK: THE NATIONAL RAILROAD PASSENGER CORPORATION 43-62 (1980).

125. EXPORT-IMPORT BANK OF THE UNITED STATES, 1988 ANNUAL REPORT.

126. *Id.* at 28.

and unassignability to the private sector.

Furthermore, government corporations are more common in less-developed countries where capital is scarce or prohibitive to the average investor.¹²⁷ In effect, this prohibitive cost of capital prevents private takeovers of government corporations in these countries. Therefore, the expanded marketability rationale that assumes availability of capital fails to apply to the vast majority of situations where government corporations exist. Additionally, most developing countries that form government corporations have an acute absence of qualified managers in their labor market.¹²⁸ Thus, the assumption upon which this rationale is based is undermined.

The fifth rationale for the grant of corporate limited liability is to allow market prices to convey additional information about corporations.¹²⁹ If all shares are fundamentally alike, any decrease in share price is reasonably attributable to lower expectations of corporate profitability by the general public.¹³⁰ When the share price signals lowered expectations, other investors are invited to compare the market's expectation of profitability with their own assessment of the potential profitability.¹³¹ If an investor's personal assessment indicates a better future than that predicted by the market, the investor will purchase the stock.¹³² If the converse is true, the investor will not buy the stock and existing shareholders will sell their shares.¹³³

If shareholders were liable for the debts of the corporation to the full extent of their wealth, stock prices would not reliably reflect accurate market expectations of corporate profitability. Instead, the shares would reflect both expected profitability and shareholders' solvency. This mixture of information would then be useless to the investor in his analysis of the corporation as a profit-making entity. Once again, this rationale does not apply to an entity whose shares are not available to the public and whose activities are undesirable to investors.¹³⁴

The sixth rationale for a grant of limited liability, like the preced-

127. Appendix, *supra* note 105, at a11-a12.

128. Amicus Curiae, *supra* note 120, at 6.

129. For an excellent discussion of how prices reflect and react to information, see Gilson & Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 549-92 (1984).

130. Easterbrook & Fischel, *supra* note 101, at 96.

131. C. JONES, INVESTMENTS: ANALYSIS AND MANAGEMENT 260-69 (1985).

132. *Id.*

133. *Id.*

134. Appendix, *supra* note 105, at a11-a12.

ing five, is applicable only when the shares of an entity are publicly traded. According to this rationale, limited liability enables investors to efficiently diversify their investments.¹³⁵ Under a rule of unlimited liability, investors would not diversify their holdings, as each additional investment would entail new risks associated with the managerial conduct of the new enterprise. With limited liability, investors need not worry about high risks of losing all their wealth because of one large claim against a single corporation. As such, these investors will be able to combine risky and safe investments to form an ideal portfolio suited to their individual risk aversion and desired return.¹³⁶ Since investors cannot diversify into government corporations, the rule of limited liability does not apply to public enterprises. When investors are barred from investing in government corporations, either by choice or by law, limited liability of such corporations is irrelevant to their investment calculations.

A seventh rationale for limited liability is that this legal privilege allows managers to make optimal investment decisions for the corporation.¹³⁷ This theory states that when investors are not individually liable for the corporation's debts, the managers will be able to make investment decisions beneficial to the corporation, free from the threat of severe shareholder impact.¹³⁸ However, this rationale is inapplicable when an opportunity to invest in the corporation is absent. Thus, when managers have only the interests of a single shareholder in mind, due to lack of private investment opportunities, it is not necessary to grant limited liability to the corporation. This situation exists in the case of government corporations, so managers need only consider the goals of the government. Therefore, the absence of a rule of limited liability will not be as cumbersome for government managers compared to private managers who must consider the interests of potentially thousands of shareholders.

Finally, the grant of limited liability to corporate shareholders reduces the capital costs for corporations, thereby increasing the

135. Easterbrook & Fischel, *supra* note 101, at 96.

136. C. JONES, *supra* note 131, at 558-60, 582. The concept of "efficient portfolios" which provide maximum return for a given level of risk was originated by Harry Markowitz in his seminal article "Portfolio Selection." See Markowitz, *Portfolio Selection*, J. OF FIN. 77 (Mar. 1952).

137. Easterbrook & Fischel, *supra* note 101, at 95.

138. "In the jargon of portfolio theory, when investors are or can be diversified, managers should consider only systematic risk in making decisions. When investors cannot diversify their holdings, managers should consider both systematic and unsystematic risk. The consideration of unsystematic risk may lead them to forgo profitable investments." *Id.* at 97 n.12.

availability of investment funds that would otherwise be unavailable.¹³⁹ According to this rationale, under a rule of unlimited liability, creditors or potential investors would have to ascertain the risk associated with lending a corporation funds by looking at the wealth of individual shareholders.¹⁴⁰ Consequently, the costs associated with such an assessment will be passed on to the corporation in terms of a higher cost of capital. With limited liability for corporations, however, the creditors need only look to the corporation itself and assess that single entity's financial health.¹⁴¹

This rationale, like others discussed above, is inapplicable to government corporations because the absence of potential equity investors renders this rationale irrelevant. Even if such an investment market did exist, government ownership of a major stake in a corporation would make the entity less marketable, as uncertainty regarding the political motivations of the managers would increase the risk of such investments. Additionally, creditors of government corporations look to the government for payment of the corporation's debts.¹⁴² Therefore, the fiscal health of the government entity is a minor consideration. Since government corporations are commonly unprofitable entities,¹⁴³ it is the government's fiscal health that is of primary concern to the investor.

As illustrated above, the traditional theories for the presumption of limited liability for private corporations are inapplicable to government corporations. Additionally, there are compelling practical reasons why government corporations should not be granted a presumption of limited liability.

B. Case and Consequences for a Presumption of Liability

There are factors which support a rule favoring a government's presumption of liability for the debts of their corporations. First, since government corporations are innately political creatures, subject to the commands of a political master, it is better to assume that such corporations do not necessarily act out of economic motives.¹⁴⁴ Managers of such corporations, as well as their subordinates, are likely to

139. *Id.* at 98.

140. *Id.* at 101 (discussing this problem in the context of the corporation purchasing insurance in the absence of limited liability).

141. *Id.*

142. Appendix, *supra* note 105, at a4.

143. *Id.* at a5.

144. Brief for the United States as Amicus Curiae in Support of Petitioner at 22, First

be political appointees with particular political goals.¹⁴⁵ Thus, they are more likely to overstep the bounds of basic economics and directly or indirectly cause economic harm.¹⁴⁶ Furthermore, in the event that such harm does occur, it is likely to involve a greater quantum of injury.¹⁴⁷

The second factor in favor of a presumption of liability is that courts are more likely to pierce a corporate veil when excessive economic risk-taking is present.¹⁴⁸ There is great potential for socially excessive levels of risk-taking in government corporations. Government employees are more secure in their positions as compared to private employees. Public employees are less likely to be discharged for bad judgment, and enjoy greater job security.¹⁴⁹ Therefore, the potential for errant behavior is increased in government corporations.¹⁵⁰

Of course, this presumption of unlimited liability, by itself, will not automatically expose government corporations to huge, unmanageable claims of destructive power. A general theory of law is that a law of its own force does not affect economically feasible behavior.¹⁵¹ This theory is expressly recognized by scholars of government corpo-

Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983) (No. 81-984) [hereinafter Brief for the United States].

145. *Id.*

146. Appendix, *supra* note 105, at a3.

147. This likelihood of increased harm arises from the great economic wealth entrusted to government corporations. For example, "[i]n Argentina, three-quarters or more of the sectors of electricity, petroleum, coal, steel, railways, domestic air transport, maritime transport, gas and re-insurance are covered by public enterprises" *Id.* at a2. A "high percentage of [state trading organizations] have in fact monopolistic positions. . . ." *Id.* at a5 (quoting REPORT, INTERNATIONAL SYMPOSIUM OF STATE TRADING ORGANIZATIONS OF DEVELOPING COUNTRIES, 29 MARCH-2 APRIL, at 10 (ICPE 1982)). See also UNITED NATIONS DEPT. OF ECONOMIC AND SOCIAL AFFAIRS, ORGANIZATION, MANAGEMENT AND SUPERVISION OF PUBLIC ENTERPRISES IN DEVELOPING COUNTRIES.

148. Easterbrook & Fischel, *supra* note 101, at 109.

149. One reason for the establishment of government corporations is to limit the rights of the employees under internal government regulations and to allow the managers of the corporations greater autonomy in hiring and firing of employees. Amicus Curiae, *supra* note 120, at 7-8.

150. It is also noteworthy that in many less developed countries, the lack of organization and responsibility is widespread. Ghai, *supra* note 99, at 63. "[T]here is considerable confusion as to who has responsibility for what[,] both at the level of the government and the level of the enterprise," giving "[t]he overall impression in many countries . . . of massive government intervention but little control . . ." *Id.* at 62-63.

151. This is generally known as the Coase Theorem. See Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

rations.¹⁵² Thus, a rule of unlimited liability does not automatically preclude the government corporation from taking other available routes to limit its liability. Foremost among these alternatives is the contract method. The government corporation could simply mandate a standard practice of obtaining the consent of its creditors to seek only the assets of the corporation itself, holding the government free of any claims. Essentially, this shifts the burden to the government corporation to exonerate itself of unlimited liability.

Another protective alternative available to the government corporation is insurance.¹⁵³ This alternative is particularly important for protection against involuntary creditors, such as tort victims of the corporation's activities.¹⁵⁴ In fact, such an alternative is more efficient than a legal presumption of limited liability, as this insurance alternative internalizes agency costs and corporate externalities involved with the operation of the corporation.¹⁵⁵

Finally, limited liability has not traditionally been deemed essential to the existence of corporations. In the early days of this country's existence, shareholders were frequently liable for all the claims of their corporations.¹⁵⁶ Even today, there are statutes imposing personal liability on corporate stockholders for certain claims against the corporation.¹⁵⁷ Thus, with the above alternatives available to government corporations, the Court could have decided the case differently with no adverse consequence to the legal implications of government entities.

VI. RESULTING INJURY TO FOREIGN GOVERNMENT CORPORATIONS AND INVESTORS ABROAD

The nebulous ruling in *Banco* satisfies neither the expectations of

152. "We know that the legal form of the enterprise is determinative of few outcomes. There is ample evidence to show that the law has been unable to hold the prescribed balance between control and autonomy." Ghai, *supra* note 99, at 59.

153. Halpern, Trebilcock & Turnbull, *An Economic Analysis of Limited Liability in Corporation Law*, 30 U. TORONTO L.J. 117, 132 (1980).

154. Easterbrook & Fischel, *supra* note 101, at 107.

155. *Id.*

156. Some early statutes, such as those in Massachusetts, expressly imposed unlimited liability on the shareholders. Other states such as New York imposed double liability. P. BLUMBERG, *THE LAW OF CORPORATE GROUPS: TORT, CONTRACT AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS* 23-27 (1987).

157. See, e.g., N.Y. BUS. CORP. LAW § 630 (imposes personal liability for the wages of certain employees on the 10 largest shareholders of a non-public corporation).

foreign government corporations, who would like full immunity, nor the demands of U.S. investors who want full access to sue such corporations. The Supreme Court stated that failing to grant the presumption of limited immunity would "cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee."¹⁵⁸ However, if the Court had denied the presumption, it could have encouraged credit extension, as potential creditors would have gained confidence in their ability to resort to the courts in case of a corporate default.¹⁵⁹

The Court itself recognized the need for more responsible foreign government corporations.¹⁶⁰ One reason why the Court chose federal choice of law principles over those of Cuba or New York was that otherwise, the state could violate international law and yet be free from liability.¹⁶¹ However, the Court has not gone far enough to prevent this potential state abuse.¹⁶² The Court's holding, in effect, stated that it will use choice of law principles to bring foreign government corporations into United States' courts,¹⁶³ but will nevertheless presume the foreign entity not liable. However, the reality of international politics and economics, reflected in the non-corporate nature of government corporations, strongly favors a rule of unlimited liability.

Foreign government corporations are also hurt by the Court's holding because the Court has not reduced legal uncertainty for these governments who conduct business in the United States. On one hand, the Court holds that shareholders of foreign government corporations are entitled to limited liability.¹⁶⁴ On the other hand, the Court states that if such corporations engage in certain conduct, such as working too closely with their respective governments or following the orders of these governments, this presumption of limited liability will not apply.¹⁶⁵ However, as the Court itself noted,¹⁶⁶ this integral

158. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626 (1983).

159. This follows since, in the absence of limited liability, the sole shareholder of the corporation, the government, would have been fully liable for the debts of the corporation. *W. CARY & A. EISENBERG*, *supra* note 111, at 91-92.

160. *Banco*, 462 U.S. at 622.

161. *Id.*

162. *Id.*

163. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621-23 (1983).

164. *Id.* at 629.

165. *Id.* (citing *NLRB v. Deena Artware, Inc.*, 361 U.S. 398 (1960), for the proposition that extensive control by a shareholder leading to a principal-agent relationship will cause the shareholder to lose the presumption of limited liability).

working relationship with government is always present in the case of foreign governments.¹⁶⁷

Finally, the Court makes it more difficult for United States investors with nationalized properties abroad to seek legal redress. Different branches of the same revolutionary government often conduct nationalization programs. However, in such circumstances, United States courts presume that these government agencies and instrumentalities are immune from liability. United States investors must now resort to foreign courts which have traditionally been hostile to United States economic interests. Yet these forced actions occur when foreign governments have considerable assets in the United States which are sufficient to meet all liabilities.¹⁶⁸ Furthermore, the U.S. government already has the power to reach these U.S. based assets through the International Emergency Economic Powers Act,¹⁶⁹ and the Trading with the Enemy Act.¹⁷⁰ These two provisions allow seizure of a hostile government's assets in the United States. For example, the International Emergency Economic Powers Act was used in the 1980 hostage crisis to freeze Iranian assets in the United States to satisfy claims of United States investors against the government of Iran.¹⁷¹ Similarly, it is logical and desirable to extend this protection to investors abroad.

VII. CONCLUSION

The Supreme Court's ruling in *Banco* was a diplomatic reflection of the practicalities of the issue presented to the Court. When confronted with a wrongful exercise of a foreign government's nationalization powers, the Court chose to base its ruling on equitable grounds when adequate legal grounds already existed for the same decision. Although the Court achieved a legitimate result by the indirect means of equity, the same principles of equity and justice should have compelled the Supreme Court to go further. By presuming foreign gov-

166. *Banco*, 462 U.S. at 624. "[Government corporations are] created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law." *Id.*

167. Appendix, *supra* note 105, at a3.

168. In 1985, foreign investment in the United States was estimated at approximately \$183 billion. T. CLASEN, *supra* note 11, at 255.

169. 50 U.S.C. §§ 1701-1706 (1983).

170. 50 U.S.C. app. §§ 1-44 (1983).

171. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1980); Exec. Order No. 12,205, 45 Fed. Reg. 26,658 (1980); Exec. Order No. 12,211, 45 Fed. Reg. 26,685 (1980).

ernment corporations fully liable for the acts of their governments, the Court could have effectively furthered the economic justice due United States investors abroad.

*Ebbi Izadian**

This Note is dedicated to my parents to whom I shall forever be indebted.